Court, U.S.
FILED
JAN 13 1999
OFFICE OF THE CLERK

No. 98-964

In The

Supreme Court of the United States

October Term, 1998

DILAWAR M. EDWARDS, Ph.D.,

Petitioner,

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICI

**The Association of American Educators
The Association For Supervision And Curriculum Development
The Association For Educational Communications and Technology**

In Support of Petitioner

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QUESTION PRESENTED

1. Whether the Third Circuit Court of Appeals was correct in applying the standard of public secondary school cases to that of a university professor and concluding that a professor does not have a First Amendment academic freedom right to choose classroom materials and subjects in contravention of the University dictates?

PARTIES TO THE PROCEEDINGS

California University of Pennsylvania was a party at the U.S. District Court level, and was dismissed at summary judgment on Eleventh Amendment grounds. The remaining Respondents listed in the caption were parties to the proceedings in the court below.

In addition, Dr. Angelo Armenti, the current President of the University at the time of trial, was automatically substituted as a party for purposes of Petitioner's request for injunctive relief under Fed.R.Civ.P. 25 (d)(1).

The Petitioner is properly listed in the caption, and is not a corporation for purposes of Supreme Court Rule 29.6.

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JURISDICTION[1]

Judgment was entered on August 10, 1998 by the Court of Appeals affirming the judgment of the District Court which had been entered on April 16, 1997 (App. B-1). The Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing In Banc, and the Court of Appeals denied the Petition on September 14, 1998 (App. C-1).

Jurisdiction of the Court is conferred under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

INTEREST OF AMICI

As organizations serving a membership that includes thousands of professors, teachers, students and scholars, it behooves us to defend the First Amendment rights of the faculty, especially those that relate to faculty rights and protections as guaranteed by the Collective Bargaining Agreement and the Constitution of the United States.

STATEMENT OF THE CASE

Amici incorporate herein by reference the facts as delineated by Petitioner in his Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Academic freedom at a university level is of a different nature than at the high school/secondary level. The Third Circuit ***erred*** when it applied the *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F. 2d 1172 (3rd Cir. 1990) case – a secondary school case and set of facts – to the university level. There are key distinctions between high school and university students, and distinctive settings between high school versus university classrooms, and between the credentials of high school teachers and university professors. There is a fundamental necessity of academic freedom for the university level professor regardless of whether it is a state or private college or university.

Professor Edwards has been denied the right that every other professor at this university has to exercise his

or her professional judgment about the selection and use of teaching materials in courses they teach. This has been done on the basis of a procedurally irregular, ideologically driven abuse of power by administrators who believe that the use of materials including references to religions and/or containing world-views or ideas based in religions or any consideration or references to religions and/or expression of a conservative and pro-religious (but not partisan or proselytizing) point of view, is tantamount to "fundamentalism," and must be excluded from a public university.

ARGUMENT

ACADEMIC FREEDOM AT A UNIVERSITY LEVEL IS OF A DIFFERENT NATURE THAN AT THE HIGH SCHOOL/SECONDARY LEVEL.

The Third Circuit Court of Appeals, at App. A-6, cites the *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F. 2d 1172 (3rd Cir. 1990) *a public* ***school*** case where it explained that:

> No court has found that *teachers'* First Amendment rights extend to *choosing their own curriculum* or *classroom management techniques* in contravention of *school policy or dictates.* (emphases added)

The court then proceeds to apply the above public *school* case to a public *university:*

> We conclude that a public *university professor* does not have a First Amendment right to decide *what will be taught* in the classroom.

If **a public school** and **a public university** ***are the same*** – and there are ***no*** differences – then the court's logic would be understandable and acceptable.

Inasmuch as public schools and public universities differ, and **do differ very significantly**, the court's reasoning is erroneous, and ***must be reversed***.

There are many differences between schools and universities in institutional governance, and differing characteristics and level of maturity of the target group served, such as: pupils /students /freshmen /sophomores /juniors /seniors /undergraduates /graduate /scholars /doctoral /post-doctoral candidates; classroom environment, educational setting, type of instruction, and major differences in methods and requirements between schools and universities.

The Third Circuit Court of Appeals has erroneously used case-law that is relevant to secondary schools and applied it to universities.

Case-law for schools is determined within a framework of: public ***school*** pupils/students (who are more immature and impressionable than university students); ***school teachers*** (*not* required to specialize with an earned terminal degree, and professionally are somewhat limited); ***school*** settings (moderate expectations and restrictive educational governance and policy).

The frame of reference at universities is quite different from schools in that there are: public ***university*** students /scholars (who are older /mature /quite sophisticated); ***university tenured professors*** (who are highly qualified in their fields – an earned terminal

degree – and have earned tenure, and have professional autonomy and exercise professional judgment); ***university*** settings with Collective Bargaining Agreements and stated policies meant specifically for fostering higher education and higher learning, and the pursuit of truth.

Therefore, case law for *school* cases and *school teachers* is quite *inappropriate* application to *universities* and *university professors*.

In *Kirkland v. Northside Indep. Sch. Dist.*, 890 F. 2d 794, 800 (5th Cir. 1989) the Court refers to "teachers" (not university professors), and "school curricula," and says:

> Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon ***teachers*** the control of public ***school curricula***. (emphases added)

The court again refers to: a *school* case, to *school teachers*, to *"school* policy or *dictates,"* and *"choosing their* ***curriculum,"*** and emphasizes:

> the Bradley court's instruction that public school teachers must abide by 'school policy or *dictates'* **when choosing their curriculum**. (emphasis added)

The court somehow fails to distinguish between *curriculum* and *curriculum* ***materials***. *To be "choosing their* ***curriculum"*** is an *entirely different matter than it is to be choosing their curriculum* ***materials***.

Significantly, the Third Circuit's academic freedom standard is found in *Keyishian* and *Tinker*. *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F. 2d 1172, 1176 (3rd Cir. 1990):

> We do not have to delineate the scope of [teachers'] academic freedom . . . under the First Amendment . . . See Tinker . . . [and] Keyishian- . . . courts have found this right to encompass **the right to exercise professional judgment in selecting topics and materials for use in class.** (emphasis added)

The court has asserted that:

> the First Amendment does not place restrictions on a public university's ability to control its curriculum. App. A-7

The university arguably may have some influence or control on the faculty university-wide curriculum committee on which professors are involved in making curriculum decisions.

Nevertheless, the Third Circuit Court of Appeals has erred in *failing to maintain **very significant and crucial differences and distinctions among terms such as***: "curriculum" "course" "subjects" "topics" "course outline" "syllabus" "curriculum materials," "teaching materials," etc.

ACADEMIC FREEDOM IS A WELL-RECOGNIZED CONCEPT AT THE UNIVERSITY LEVEL AS OPPOSED TO THE SECONDARY LEVEL AND MUST BE PROTECTED

The Association for Educational Communications and Technology's Code of Professional Ethics requires that professors:

> 1. Shall encourage independent action in an individual's pursuit of learning and shall provide access to varying points of view.
>
> 2. Shall protect the individual rights of access to materials of varying points of view.
>
> 8. Shall in the design and selection of any educational program or media seek to avoid content that reinforces or promotes gender, ethnic, racial or religious stereotypes. Shall seek to encourage the development of programs and media that emphasize the diversity of our society as a multi-cultural community.

App. I, Ex. No. 469

In 1987, The Association for Supervision and Curriculum Development came out with a report entitled: *Religion in the Curriculum: A Report from the ASCD Panel on Religion in the Curriculum.* Of the many excellent points made, of particular relevance to Dr. Edwards' efforts as a teacher educator with his students were the following recommendations by the ASCD Panel:

> **1. Teacher Educators, both preservice and inservice, should ensure that teachers acquire not only the substantive knowledge required to teach about religion in society but also the attitudes and understanding necessary to treat the subject with sensitivity in the classroom.**
>
> **2. Teachers, administrators and members of the public should be aware of the impact of court decisions on the curriculum and should recognize that teaching about religion is not unconstitutional.**
>
> **3. State departments of education should address the issue of fair and factual treatment**

> **of religion in the curriculum by all local education agencies.**
>
> **4. Textbook selection committees at the state, district and local school levels should require such treatment of religion in all curricular materials . . .**
>
> **5. Publishers should revise textbooks and other instructional materials to provide adequate treatment of diverse religions and their roles in American and world culture and to include appropriate religious and moral themes in literary and art history anthologies.**

App. Vol. III, Tr. Feb. 19, 3-4

The American Association of University Professors (AAUP) was formed to stem the erosion of academic freedom for professors who faced reprimand or dismissal for making statements or acting in a manner displeasing those in authority. *Professors on Guard: The First AAUP Investigations,* (W. Metzger ed. 1977). Its founding document, the *Declaration of Principles* (1915), recognized the need for the university to set a basic curriculum and established that *the independence of the professor regarding classroom method and scholarly view is essential in maintaining the intellectual integrity of the professor and the university.* It defined academic freedom in the classroom:

> It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. No man can be a successful teacher unless he enjoys the respect of his students and their confidence in his intellectual integrity . . . this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or

> frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with the candor and courage which youth always demands in those whom it is to esteem.

General Report of the Committee on Academic Freedom and Tenure, I AAUP Bulletin 17 (1915), reprinted in 53 Law and Contemporary Problems 393, 398 (1990).

In its Declaration of Principles (1915) the AAUP set forth that the university's authority over the university professor is not that of "a public employer which may reasonably restrict the speech rights of employees." Instead, **the professor is an *"appointee"*** and . . . once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competence nor moral right to intervene."

Law and Contemporary Problems at 397. The professor's function is **one of an appointed professional with a specialized competence in his academic area**. This competence has been recognized by, and must be free from interference by those in authority.

The 1915 document has been refined as to the rights accorded tenured professors. The A.A.U.P.'s 1940 *Statement of Principles of Academic Freedom and Tenure*, (and Interpretive Comments thereto) is now widely accepted by university professors and universities:

> . . . institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

American Association of University Professors, "Policy Documents and Reports" 1, 3 (1984). Controversial thought and inquiry are "at the heart of the free academic inquiry which the entire statement is designed to foster." A.A.U.P., Policy Documents and Reports, 1970 Interpretive Comments at 5. The A.A.U.P. recognizes the tenured professor's right to free and full inquiry of the subject matter under his instruction, since the common good requires "free" search for truth and the discussion of controversial ideas. ***These concepts have long been recognized by both professors and the courts,*** *and A.A.U.P. academic freedom principles are often incorporated into faculty contracts* – (e.g., **the Collective Bargaining Agreement between SSHE and APSCUF** App. 117, 975) – M. Olivas, *The Law and Higher Education: Cases and Materials on Colleges in Court,* 134 (1989). **Courts refer to the A.A.U.P. declarations** as indicia of general practice or custom when faculty contracts are ambiguous, acknowledging the importance of the above-stated basic tenets. W. Kaplin, *The Law of Higher Education* '3.6.1 at 180 (2nd Ed. 1985).

The U.S. Supreme Court has long recognized the importance of academic freedom and protected it under the First Amendment, recognizing the importance of the teacher's "free play of the spirit" to the preservation of academic integrity:

> It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very

> atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them.

Wieman v. Updegraff, 344 U.S. 183, 195 (1952).

University students are less impressionable than younger students and are able to appreciate that the university's policy is one of neutrality toward religion. *Tilton v. Richardson*, 403 U.S. 672 (1971). *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981).

Thus university professors have more latitude in choosing their **subject matter** than those who teach younger students, *Peloza v. Capistrano Unified School District*, 782 F. Supp. 1412, 1417 (C.D. Cal. 1992), even regarding controversial **subjects** such as Origins. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

CONCLUSION

For the foregoing reasons the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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